DEPARTMENT OF STATE INSTRUCTION

CONFIDENTIAL
(Security Classification)

NO. A-639 February 15, 1954

SUBJECT: Rights of American Attorneys to Continue Practice in Japan

TO: The American Embassy, Tokyo.

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DEPARTMENT OF STATE FOR DC US ONLY
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In its telegram no. 1708 of January 11, 1954, the Embassy has inquired whether American lawyers who have been admitted to the Japanese bar can be denied the right to continue to practice law in Japan by reason of the reservation contained in the treaty of friendship, commerce and navigation relating to professions. The Embassy has also requested information regarding bases for the revocation of professional licenses in the United States.

(1) On January 15 the Department in its telegram no. 1667 advised the Embassy that it was looking into the question whether the contemplated Japanese action regarding United States attorneys constituted an impairment of their legally acquired rights or interests within the meaning of Article V, paragraph 1, of the treaty.

While arguments can be made on either side of this question, the Department considers that as to those attorneys who were licensed to practice law in Japan at the time the treaty went into effect, the article would appear to apply. The article speaks of "legally acquired rights or interests" and makes these words applicable to "enterprises", "capital", and "skills, arts or technology". The verb tenses used indicate that the article is to apply to "legally acquired rights and interests" without reference to whether acquisition occurred before or after the treaty entered into force. It would not be unreasonable to contend that the terms cited are used to make clear that the coverage afforded is not to be construed as narrowly limited to investment transactions but as extending to diverse activities variously involving the use or contribution of money, goods and "know-how". The latter reasonably may include a wide variety of professional services. The scope of this provision thus is sufficient to cover, among other things, rights in professional licenses which, as indicated below, are commonly regarded in American jurisprudence as property rights.

The intent of the provision is to establish on as broad a basis as practicable the general principle that there shall be no retroactive impairment of various property rights acquired commonly, but not exclusively, during the investment process. The provision is specifically

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specifically addressed to vested rights, as that term is generally understood at law, and its function is protective. It will be recalled that in the draft treaty initially presented to the Japanese this provision formed part of the article relating to the protection of property, and the Department would not have agreed to its transfer to another position in the treaty if by doing so would give rise to interpretations contrary to the intended purpose of establishing norms of fair treatment and adequate protection for vested rights.

In the memorandum of the Department of State submitted to the Committee on Foreign Relations, United States Senate in May 1952, which at that time considered several treaties of friendship, commerce and navigation, the Department stated with regard to Article VIII of the Greek treaty (similar to Article V of the Japanese treaty) as follows:

"The Department of State recognizes the limitations of the provision represented by article VIII of the Greek treaty. However, it is believed to serve a useful purpose in that it affords one more ground, in addition to all the other grounds set forth in the treaty, for contesting foreign actions which appear to be injurious to American interests. A given measure of a foreign government might, for example, be fully consistent with the national treatment or most-favored-nation treatment rules of the treaty, and also short of expropriation, but yet arbitrary and unreasonable as it affected some vested American interest in the country concerned. In that event, the only treaty ground for protest might be general language such as found in articles I and VIII of the Greek treaty. It remains, however, that the real protection of an American investment abroad rests for the most part on the more specific provisions of the treaty; the clause in question does not qualify these more specific provisions, but is merely something additional." (Emphasis supplied)

On the same point, the Embassy's attention is also invited to the negotiating minutes wherein reference is made to a suggestion by the Japanese negotiator that a clause along the lines of the Uruguayan treaty be added to Article V, as follows: "Neither party shall without appropriate reason deny opportunities and facilities for the investment of capital by nationals and companies of the other Party".

The United States negotiator in response to that suggestion expressed the view that this clause pertained to matters not germane to Article V, but rather subject to provisions already contained in Article VII and other articles. His statement in effect distinguished between provisions designed to prevent actions that would in effect block the development of new rights (specifically with reference to the investment of capital) and those designed to prevent actions that would interfere with existing rights (not necessarily immediately

immediately related to investment or act with retroactive effect on vested rights acquired in the future.

Finally, it should be noted that Article VIII is prospective in application, and the reservation, therefore, is of similar effect. Article V relates to rights already acquired. The fact that professions are dealt with specifically in Article VIII does not, therefore, exclude them from the operation of Article V when it is borne in mind that different time factors are involved in the two articles.

(2) With regard to the second point which the Embassy has raised, the following analysis of American cases is submitted as an indication that the right to practice the legal profession is a property right and therefore protected by the Constitutions of the United States and the several states. Thus, for example:

Prouty v. Heron, 255 P(2)755, decided March 9, 1953. The Supreme Court of Colorado considered the following question: "Is the right to practice a legal profession, once legally granted, within the rights protected by the Constitutions of the United States and of the State of Colorado, which provide that no person shall be deprived of life, liberty or property without due process of law?"

The court answered the question in the affirmative. The court said: "Our court has heretofore stated that the professions of law, medicine and dentistry are generally considered as learned professions, and that, 'neither is an ordinary trade or calling which all citizens alike may pursue' . . . ."

The court further said: "The right to practice such a profession has been recognized as a 'valuable right' or a 'property right' in other jurisdictions. State v. Schultz, 11 Mont. 429, 28 P. 643 (1892); Baker v. Department of Registration, 78 Utah 424, 3 P. 2d 1082 (1931); Bley v. Board of Dental Examiners, 87 Cal. App. 193, 261 P. 1036 (1927). From the case of Abrams v. Jones, 35 Idaho 532, 207 P. 724, 727, (1922), we quote the following:

> 'Where the state confers a license upon an individual to practice a profession, trade, or occupation, such license becomes a valuable personal right which cannot be denied or abridged in any manner except after due notice and a fair and impartial hearing before an unbiased tribunal.'" (Emphasis supplied.)

The court continued: "We are in accord with the authorities above cited and approve the language quoted therefrom as being applicable to this controversy. In the instant case plaintiff was duly licensed to practice the profession of engineering. He was not limited to any particular branch of that profession.

We hold

We hold that one who has qualified for admittance and license to practice engineering without restriction, under the standards applicable at the time of admission, thereby acquires a valuable right fully protected and covered by the due process clause of the Federal and State Constitutions. It follows, therefore, that the legislature cannot by statute deny or abridge that right in any manner except for cause and after due notice and a fair and impartial hearing before an unbiased tribunal."

Other cases which may be cited holding that the right to practice any profession is a property right include:

(1) Kalman v. Walsh, 355 Ill. 341, 189 N. E. 315 (1934);

(2) Suckow v. Board of Medical Examiners, 182 Cal. 247, 187 P. 965 (1920);

(3) Unger v. Landlords' Management Corporation, 114 N. J. Eq. 68, 168 A. 229 (1933);

(4) Fitchette v. Taylor, 191 Minn. 582, 254 N. W. 910 (1934);

(5) Montgomery County Bar Ass'n v. Rinalducci, 329 Pa. 296, 197 A. 924(1938);

(6) Sherman v. State Board of Dental Examiners, (Tex. Civ. App.), 116 S. W. 2d 843 (1938);

(7) Hewitt v. State Board of Medical Examiners, 148 Cal. 590, 84 P. 39 (1906).

More recent cases include:

(1) Davis v. Beeler, 185 Tenn. 638, 207 S.W. 2d 343 (1948);

(2) Sherman v. Hyman, 180 Tenn. 99, 171 S.W. 2d 822 (1942);

(3) West Virginia State Medical Ass'n v. Public Health Council of West Virginia, 23 S. E. 2d 609 (1942);

(4) Bender v. Board of Regents of University of State of New York, 30 N. Y. S. 2d 779;

(5) State ex rel. Estep v. Richardson, 148 Fla. 48, 3 So. 2d 512 (1941).

Three cases which have held that the right to practice law is not a "property right", but a "privilege" or "franchise" can easily be distinguished. They are:

In re Edwards, 45 Idaho 676, 266 P. 665 (1928); Application of Knight 30 N. Y. S. 2d 985, and Ayres v. Hadaway, 303 Mich. 589, 6 N. W. 2d 905 (1942).

These

These cases in effect hold that there is no vested right to engage in a profession free from statutory regulation. The holdings concede that once a certificate of admission to the practice of law has been given, the holder thereof has a vested right of which he cannot be deprived except on good cause and after proper judicial proceedings. (See in this connection an opinion by the S. D. Supreme Court, In re Applications for Admission to Practice, 14 S. D. 429, 85 N. W. 992 (1901)) Thus in Ayres v. Hadaway, supra, for example, during the trial of the case the defendants objected to the appearance as one of the counsel for the plaintiffs of a lawyer who was not on the "active" list of attorneys of the State Bar of Michigan, but was on the "inactive list". The rules adopted by the Michigan Supreme Court under the Integrated Bar Act provided for two classes of members of the State Bar. Active members are required to pay annual dues of $5 each. Inactive members are relieved from the payment of dues, but are prohibited from practicing law and from voting or holding office in the State Bar. Plaintiffs claimed that the practice of law is a property right and that the Integrated Bar Act in giving the court power to regulate that right took away property without due process. It is in this context that the court held the practice of law is not a property right. The court further held that the supreme court has inherent power to regulate the qualifications of persons permitted to practice law in the state, and that the legislature has adopted a statute to that effect does not make the act invalid. Therefore a lawyer, although duly licensed, could properly be prevented from engaging in active practice while on the inactive list; but this did not prejudice his property right for he had full liberty to return himself to the active list and resume practice.

It was pointed out in the case of State v. Healow, 38 P. 2d 285 (1934), that the erection of new standards of qualification by laws relating to them seldom contemplate the reexamination and relicensing of those previously licensed and actually operating under the terms of the law in effect at the time of the issuance of the original license. Such a provision, it was stated in the case, was consonant with generally recognized principles of fairness and justice. Another case (Minnesota v. Vandersluis, 6 L.R.A. 119 (1890)) involved an act passed in 1889 to regulate the practice of dentistry. The act was held to be constitutional. Those qualified to practice dentistry under an earlier law continued to be qualified under the act of 1889, including both those who were in practice at the date of the former act, and registered as it required, and those who became qualified by the examination and certificate provided by it.

While it is recognized that the state in the exercise of its police power can reasonably restrict and regulate the engaging in professions, the foregoing cases nevertheless make clear the proposition that such restrictions and regulations which interfere with or prevent those who have long been engaged in such professions from continuing in the same conflict with the constitutional right of the enjoyment of property.

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As of relevance to the matter in issue, reference is also made to the common acceptance and application of the principle of no retroactive impairment in other fields of United States law, e. g. general corporation law. In foreign countries, too, laws and regulations can be found exempting existing enterprises from new qualifying procedures.

The Embassy's informal remarks to the Foreign Office that professional licenses generally are considered to be a right which cannot be revoked except for just cause and due process are well-taken. It might be in point to emphasize that aliens in the United States are entitled to the same constitutional guarantee.

The Embassy is authorized to state the views hereinabove outlined should the Japanese Government still seriously consider applying the reservation to the professions clause in a retroactive manner.

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